

WATER RIGHT LEASE RENEWAL AGREEMENT

THIS Agreement is made and entered into between MONTANA FISH, WILDLIFE & PARKS (FWP) and MOUNTAIN SKY GUEST RANCH (MOUNTAIN SKY), hereinafter collectively referred to as “the Parties.”

WHEREAS, FWP desires to continue to lease water through this Water Rights Lease Renewal Agreement (Agreement) to maintain a continuous instream flow in the lower 1.4 miles of Big Creek, from a point 1.4 river-miles from the mouth of Big Creek, to Big Creek’s confluence with the Yellowstone River; and

WHEREAS, without the Agreement stream dewatering in this section of Big Creek limits the capacity of the creek to produce Yellowstone Cutthroat Trout recruits for the fishery of the mainstem Yellowstone River; and

WHEREAS, Yellowstone Cutthroat Trout are recognized as a species of special concern in Montana; and

WHEREAS, the purpose of this Agreement is to provide a flow of up to 7.2 cubic feet per second (cfs) necessary to help prevent fry losses of Yellowstone Cutthroat Trout caused by redd dewatering in Big Creek; and

WHEREAS, MOUNTAIN SKY owns water right Statement of Claim 43B 195265 00 for irrigation from Big Creek and desires to continue to lease a portion of this right to FWP for instream flow purposes; and,

WHEREAS, MOUNTAIN SKY has submitted Application to Change 43B 30114637 which includes requested changes to Statement of Claim 43B 195265 00 and other water rights that will result in water remaining in Big Creek to mitigate losses of return flows and serving to replace the water presently leased to FWP.

WHEREAS, the Parties intend that this Agreement provides a mechanism to utilize the provisions of §85-2-436, MCA, to accomplish the renewal of the existing water right lease and continue to accomplish the instream flow purposes of the existing lease until such time that Application to Change 43B 30114637 and all related applications are approved.

THEREFORE, the Parties agree as follows:

1. Lease of Water Rights. Under the terms of this Agreement, MOUNTAIN SKY leases to FWP for instream flow purposes up to 7.2 cfs of water right Statement of Claim 43B 195265 00 for the entire period of use claimed.

2. Term of Agreement. The term of this Agreement is from the date of execution through April 30, 2024 or the last date on which Application to Change 43B 30114637 and all related applications are approved by DNRC, whichever occurs first.

3. Lease Payment. In consideration of the lease of the portion of the water rights owned by MOUNTAIN SKY pursuant to this Agreement, FWP shall pay a sum of \$15,000 annually to MOUNTAIN SKY. The first payment shall be made by May 31, 2019 or within 30 days of approval of the temporary authorization to change the water rights to instream flow by DNRC, whichever is later. Subsequent payments shall be made by July 31st of every year the Agreement is in effect for the entire irrigation season.

4. Donation. Based on the previous 2009 annual lease payment of \$3,203 per cfs leased adjusted to \$3,792 for inflation using the Consumer Price Index, the total lease value is \$27,300 of which Mountain Sky agrees to donate the \$12,300 difference between the total lease value and the lease payment in Paragraph 3.

5. Monitoring Plan. FWP will continue to implement the existing measuring and monitoring plan as required by §85-2-436, MCA and FWP shall pay all costs associated with the measuring and monitoring plan.

6. Administration of Leased Instream Flows. The Parties agree that upon execution of this Agreement FWP will rely on the informal water allocation system currently in effect among the Big Creek water users to deliver the leased water for instream use. However, if working within the existing system is not effective in ensuring the delivery of the instream water and if a water commissioner is the only feasible way of ensuring the delivery of the instream water, the parties agree to file a joint petition to the District Court for the appointment of a water commissioner for Big Creek when necessary to meet the terms of this Agreement. Upon appointment by the District Court, the water commissioner shall admeasure and distribute the water to water users on Big Creek in accordance with Title 85, Chapter 5, MCA. The Parties agree that the petition shall specifically request the Court to order the Water Commissioner to

admeasure and distribute any water leased by FWP under this Agreement. The expense of the water commissioner shall be paid in accordance with Title 85, Chapter 5, MCA.

7. Subordination of Instream Flow: The portion of the water right being leased for instream flow purposes is subordinate in priority to that portion not being leased.

8. Exercise of Junior Water Rights: At the verbal or written request of MOUNTAIN SKY, FWP agrees to not exercise of 1.26 cfs of all water being leased in Big Creek after August 26th of any year so that MOUNTAIN SKY can exercise junior water rights.

9. Approval of DNRC. This Agreement is subject to approval by DNRC of the renewal of the temporary change to instream flow. If DNRC does not approve the temporary change to instream flow, this Agreement shall terminate.

10. Contingencies.

a. The renewal of the water right lease is expressly conditioned upon satisfaction of the following conditions and contingencies, in addition to the other terms of this Agreement:

i. The Montana Fish and Wildlife Commission must approve the Agreement.

ii. FWP must secure funding for the Agreement through the Future Fisheries Improvement Program and/or other sources.

b. If the contingencies in Paragraphs 10(a)(i) and 10(a)(ii) are not satisfied by May 31, 2019, FWP or the Lessors may withdraw from this Agreement by sending written notice to the other party to that effect. Upon such withdrawal, FWP shall have no obligation or right to continue to lease the water rights, the Lessors shall have no obligation to continue to lease the water rights to FWP, this Agreement shall be of no further force and effect, and the Parties shall have any liability to the other Party under this Agreement. Alternatively, the time for satisfaction of the contingencies may be extended by written agreement of all Parties.

11. Default. If either party fails to perform any obligations required by this Agreement, the other party may serve a written notice upon the failing party specifying the default. The defaulting party shall have thirty (30) days from the date on which written notice of default is given to correct the default if the default is correctable. If the default is not correctable, or if the default is not corrected within thirty (30) days of notice, or if the default cannot be remedied within the thirty (30) day period and the defaulting party has not initiated a remedy of the default within thirty (30) days and thereafter diligently and continuously pursued the remedy to

completion, then a non-defaulting party may terminate this Agreement and retake or return possession, if applicable, without additional notice.

12. Notice. Any notice to be given under this Agreement shall be in writing and shall either be served upon the party personally or served by registered or certified mail, return receipt requested, directed to the party to be served at the address of the party set forth in this paragraph. A party wishing to change its designated address shall do so by written notice to the other party. Notice served by mail shall be deemed complete when deposited in the United States mail. Rejection or other refusal to accept or the inability to deliver because of changed address for which no notice was given shall be deemed to be receipt of the notice.

FWP's liaison, mailing address, and phone is:

Andy Brummond, Water Conservationist
Montana Fish, Wildlife & Parks
205 W Aztec Drive
PO Box 938
Lewistown MT 59457
Telephone: (406) 538-2445 ext. 224
Email: abrummond@mt.gov

MOUNTAIN SKY'S liaison, address, and phone is:

Yancey Arterburn
Mountain Sky Guest Ranch
P.O. Box 1219
Emigrant MT 59027
Telephone: (406) 333-4911
Email: YanceyA@mountainsky.com

13. Pending Adjudication. FWP leases the MOUNTAIN SKY's water right subject to the Montana Water Court adjudication process.

14. No Abandonment of Leased Water Rights. Pursuant to §85-2-404(4), MCA, nothing in this Agreement shall be interpreted to work abandonment or to evidence intent to abandon the water rights leased in this Agreement.

15. Indemnification. FWP shall indemnify and hold harmless MOUNTAIN SKY against any claim or action by third parties challenging the use of the water leased under this Agreement

by FWP for instream purposes, or challenging the validity of the statutes allowing the lease of water for instream purposes by FWP. FWP shall not indemnify MOUNTAIN SKY against any claim by third parties that arises out of or as a result of the negligent or willful conduct of MOUNTAIN SKY not authorized under this Agreement.

16. Binding Effect. The provisions of this lease Agreement shall be binding upon the heirs, personal representatives, administrators and successors of the parties in like manner as upon the original parties, except as provided by mutual written agreement.

17. Cooperation of the Parties. The parties hereto agree to cooperate fully and to provide such assistance and information as may be necessary to implement this Agreement.

18. Venue, Interpretation and Attorney Fees. The venue for any court action arising under this agreement with the exception of petitioning for a water commissioner must be in the First Judicial District in and for Lewis and Clark County, Montana. This Agreement must be interpreted according to the laws of Montana. In the event an action is filed to enforce, interpret or dispute this agreement, the prevailing party shall be entitled to recover reasonable attorneys fees from the other party in the suit.

IN WITNESS WHEREOF, the parties hereto execute this Agreement:

MOUNTAIN SKY GUEST RANCH

MONTANA FISH, WILDLIFE & PARKS

By: _____
Date

By: _____
Martha Williams Date
Director

Title: _____

Approved for Legal Content

By: _____
Bill Schenk Date
Agency Counsel